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No. 87-651

In the Supreme Court of the United States

OCTOBER TERM, 1987

SALIM FAKHOURY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the district court improperly admitted certain extrinsic act evidence under Fed. R. Evid. 404(b) and that the prosecutor made improper use of that evidence during closing argument. He also asserts that he was denied the effective assistance of counsel.

1. Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on one count of attempted arson, in violation of 18 U.S.C. 844(i), and three counts of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to a total of eight years' imprisonment and a consecutive five-year term of probation.

The evidence at trial showed that on the evening of September 25, 1984, petitioner burned down his failing store, Casa Blanca Liquors & Groceries, in order to collect insurance proceeds. The evidence showed that the fire was set intentionally. A gasoline-type substance had been spread throughout the store and over the store's merchandise and records. The store's fuse box and wiring system had been "hot wired" so that a steady electrical current could continue uninterrupted from an electrical outlet,

controlled by an electronic timer, through two orange extension cords to cans of gasoline placed in two separate areas of the store. The evidence further indicated that petitioner set the fire. Petitioner was in possession of the only set of keys to the store on the night of the fire, he received a set of orange extension cords like those used in the fire shortly before the fire was set, and he had past experience working with electrical equipment. Furthermore, the fire investigators found no indication of a forced entry onto the premises: the store doors and windows were secure, and the store's alarm system sounded when the firefighters entered. Pet. App. 2a-3a.

The government introduced extensive evidence establishing petitioner's motive for destroying the store. Petitioner and his father purchased the store in June 1982 for approximately $108,000. After that, petitioner's financial condition and his business steadily deteriorated. The government showed, for example, that petitioner's personal bank account had declined from an initial balance of $18,972.29 in January 1984 to a negative balance of $410.66 in September 1984. The store's checking account was also overdrawn, and the store owed $97,000 to its creditors. The store showed a history of declining purchases from suppliers and reduced food stamp redemptions, both of which indicated diminishing sales. The store's physical condition was likewise deteriorating. City health inspectors testified that the store violated health code standards that regulated sanitation and prohibited the stocking of products after their sales expiration date. The government also established that various coupon redemption centers sought to recover coupon remittances from petitioner on the ground that he submitted far more coupons than could have been used by the store's customers. Pet. App. 2a-3a.

The government next showed that on September 4, 1984, in the face of these financial difficulties, petitioner increased his fire insurance coverage, adding a $40,000

loss of earnings clause to the store's $150,000 fire insurance policy. The government then detailed petitioner's attempts to collect on his fire insurance policy. After the fire, petitioner sent three separate proof-of-loss statements to his insurance company. In the first statement, petitioner estimated his losses to be $97,033.66. His second claim was identical to the first. In his third claim, petitioner claimed the same amount of losses but certified that they were his actual, rather than estimated, losses. An independent insurance adjuster handling the claim on behalf of the insurance company estimated that petitioner's claims were overstated by at least 200 percent. In all three claims, petitioner certified that he had not caused the fire. Pet. App. 3a-4a.

2. Petitioner appealed his conviction, urging that the government produced insufficient evidence to support the jury verdict, that the trial court made a number of erroneous evidentiary rulings, and that his trial attorney did not provide him with the effective assistance of counsel. The court of appeals affirmed (Pet. App. 1a-17a). The court of appeals first concluded that there was ample evidence to support the conviction (*id.* at 4a-6a). It next ruled that the district court did not abuse its discretion by admitting, pursuant to Fed. R. Evid. 404(b), evidence of health code violations, suits filed against petitioner by coupon redemption centers, bounced checks, and outstanding debts. The court of appeals concluded that that evidence was properly admitted "to show [petitioner's] motive for setting fire to his store" (Pet. App. 8a). The court of appeals also carefully considered (*id.* at 10a-14a) whether the prosecutor's closing argument, which contained "excessive and inflammatory commentary" (*id.* at 13a), required that petitioner's conviction be reversed. The court criticized the prosecutor's commentary but nevertheless concluded that his remarks did not deny petitioner a fair trial (*id.* at 13a-14a). Finally, the court of appeals re-

jected petitioner's ineffective assistance of counsel claim. The court observed that petitioner was obliged to show "both that counsel's performance was deficient and that the deficient performance prejudiced [his] defense" (*id.* at 15a, citing *Strickland* v. *Washington*, 466 U.S. 668, 687 (1984)). The court examined each of the three incidents of allegedly ineffective assistance cited by petitioner and concluded that none of them required reversal. Pet. App. 15a-16a.

3. The court of appeals correctly affirmed petitioner's conviction. The petition for a writ of certiorari does not present any issue warranting review by this Court.

a. Petitioner renews his contention (Pet. 23-35) that the district court erred in allowing the introduction of evidence concerning petitioner's bounced checks, health code violations, and questionable coupon redemption practices. The court of appeals, however, correctly recognized (Pet. App. 9a) that this evidence of petitioner's deteriorating financial situation was directly relevant in establishing petitioner's motive to commit the arson and that the probative value of the evidence clearly outweighed any danger of unfair prejudice. See Fed. R. Evid. 403.[1] Petitioner is mistaken in suggesting that extrinsic act evidence may not be introduced "when the purpose is to show motive" (Pet. 26). The Federal Rules of Evidence expressly provide otherwise. Rule 404(b) forbids the use of "other crimes, wrongs, or acts" to prove the character of the person. But the Rule explicitly states that such

[1] This evidence — which demonstrated that petitioner's business was failing — had unassailable probative force in establishing petitioner's financial situation. Furthermore, the evidence had scant potential for suggesting a decision on an emotional or other improper basis. The described activities were relative minor wrongs that paled in comparison to the crime of arson. Petitioner's counsel objected to only one portion of this evidence at trial, and the court gave the jury a limiting instruction. See Pet. App. 8a. Plainly, the probative value of this evidence far outweighed any possibility of unfair prejudice.

evidence may be used "for other purposes, such as proof of motive * * *" (*ibid.*).[2]

b. Petitioner argues at great length (Pet 35-45) that the prosecutor's closing argument was improper. The court of appeals carefully considered that question and correctly ruled that the prosecutor's remarks, though "excessive and inflammatory" (Pet. App. 13a), did not deny petitioner a fair trial (*ibid.*). The court properly evaluated the prosecutor's conduct, applying this Court's decisions in *Darden* v. *Wainwright*, No. 85-5319 (June 23, 1986), and

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[2] The circuits are presently divided on the question whether the government must first prove that the defendant has committed "other crimes, wrongs or acts" before evidence of those activities may be admitted. The Seventh Circuit generally requires the government to prove by clear and convincing evidence that defendant committed the acts that are offered into evidence under Rule 404(b). See *United States* v. *Byrd*, 771 F.2d 215, 220 (7th Cir. 1985). The Eighth, Ninth, and District of Columbia Circuits take a similar approach. See *United States* v. *Weber*, 818 F.2d 14, 15 (8th Cir. 1987); *United States* v. *Vaccaro*, 816 F.2d 443, 452 (9th Cir. 1987); *United States* v. *Lavelle*, 751 F.2d 1266, 1276 (D.C. Cir.), cert. denied, 474 U.S. 817 (1985). The First, Second, Fourth, Fifth, Tenth, and Eleventh Circuits follow less restrictive practices. See *United States* v. *Currier*, No. 86-2131 (1st Cir. Dec. 10, 1987), slip op. 12-17; *United States* v. *Leonard*, 524 F.2d 1076, 1090-1091 (2d Cir. 1975), cert. denied, 425 U.S. 958 (1976); *United States* v. *Martin*, 773 F.2d 579, 582-583 (4th Cir. 1985); *United States* v. *Beechum*, 582 F.2d 898, 912-913, 916 (5th Cir. 1978) (en banc), cert. denied, 440 U.S. 920 (1979); *United States* v. *Culpepper*, No. 86-2867 (10th Cir. Dec. 7, 1987), slip op. 9-10; *United States* v. *Dothard*, 666 F.2d 498, 502 (11th Cir. 1982). This Court has recently granted a petition for a writ of certiorari to resolve this conflict. See *Huddleston* v. *United States*, No. 87-6 (Oct. 13, 1987). There is, however, no reason to hold this case pending the decision in *Huddleston*. The Seventh Circuit concluded here that the government established by clear and convincing evidence that petitioner committed the acts alleged. See Pet. App. 9a-10a. Thus, the government has already satisfied the most restrictive standard applied by any court for the admission of such evidence.

United States v. *Young*, 470 U.S. 1 (1985). It concluded that, in the case of prosecution remarks that received a contemporaneous objection, the prosecutor's statements did not " 'so infect[] the trial with unfairness as to make the resulting conviction a denial of due process' " (Pet. App. 12a-13a (quoting *Darden*, slip op. 12)). The court further concluded that those remarks that did not receive a contemporaneous objection, and were therefore subject to the plain error rule, "neither undermined the fairness of the trial nor contributed to a miscarriage of justice" (Pet. App. 13a). See *Young*, 470 U.S. at 15. In addition, the court of appeals observed that the trial court's repeated cautionary instructions alleviated any prejudice resulting from the prosecutor's disparaging remarks. Pet. App. 14a. The court of appeals' factbound determinations on those issues do not warrant further review.[3]

c. Lastly, petitioner renews his claim, based primarily on three innocuous trial incidents (Pet. 55-58), that he was denied the effective assistance of counsel. The court of appeals, applying the standards set forth in *Strickland* v. *Washington*, *supra*, correctly concluded that it need not even examine whether defense counsel's performance was deficient, because petitioner "clearly has not satisfied his burden of showing prejudice" (Pet. App. 15a). First, petitioner was not prejudiced by the trial court's reprimand of defense counsel for leaving the courtroom during the goverment's presentation of its case, because "the trial

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[3] The court of appeals properly distinguished this case from *United States* v. *Robinson*, 794 F.2d 1132 (6th Cir. 1986), cert. granted, No. 86-937 (Feb. 23, 1987). The court observed that this case, unlike *Robinson*, "does not involve prosecutorial comment implicating specific constitutional provisions, such as the defendant's right to remain silent, but rather involves excessive and inflammatory commentary about the [petitioner's] conduct on matters which, at least to some extent, were relevant to his motive to set fire to his store" (Pet. App. 13a) There is accordingly no reason to hold this case pending this Court's review of *Robinson*.

judge spoke to counsel while the jury was not present" (*ibid.*). Second, petitioner was not prejudiced by the fact that his counsel and a government witness shared the same surname, because counsel asked the witness at the start of cross-examination whether they were related and established that they were not (*id.* at 15a-16a). Third, petitioner was not prejudiced in any way by counsel's assertion to the court before sentencing that, had he known of certain evidence before trial, he would have advised petitioner to plead guilty. The court of appeals observed that "the district judge specifically stated in the sentencing proceedings that he would disregard" the remark (*id.* at 16a). Because none of those incidents suggests any serious default by counsel or any prejudice to petitioner as a result, the court of appeals properly rejected petitioner's ineffective assistance of counsel claim.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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[4] Petitioner also lists, without discussion, several other alleged flaws in his counsel's performance (see Pet. 56-57). None of those asserted defects can be said to have resulted in the ineffective assistance of counsel. For example, petitioner claims that his counsel improperly failed to seek the exclusion of certain admissions made by petitioner to law enforcement officers. Petitioner's statements, however, were made at the scene of the fire and on the following day, and were not the products of custodial interrogation.

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